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Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-2060

CARL M. AUSTIN, et al., Appellants

v.

STATE OF NEW HAMPSHIRE, et al., Appellees

BRIEF BY THE STATES OF MAINE AND VERMONT, AS AMICI CURIAE, IN SUPPORT OF APPELLANTS

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BRIEF BY THE STATES OF MAINE AND VERMONT, AS AMICI CURIAE, IN SUPPORT OF APPELLANTS

THE INTEREST OF THE AMICI CURIAE

The State of Maine and the State of Vermont are directly affected by the continued enforcement by the State of New Hampshire of the Commuters Income Tax in N.H.R.S.A. ch. 77-B. Our citizens working in New Hampshire pay the tax in question, and by virtue of credit provisions in our tax laws are allowed to deduct the amount of the New Hampshire tax from their income tax obligations to our states. Vermont and Maine consequently are losing income tax revenues in exactly the same amounts as New Hampshire is taxing our citizens.

QUESTIONS PRESENTED

I. Whether appellants have standing to challenge as a violation of guarantees in the United States

Constitution the New Hampshire Commuters Income Tax in N.H.R.S.A. ch. 77-B?

II. Whether the New Hampshire Commuters Income Tax, in taxing income of nonresidents earned in New Hampshire but not taxing income earned by residents, violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

III. Whether the New Hampshire Commuters Income Tax, in taxing income of nonresidents earned in New Hampshire but not taxing income earned by residents, violates the Privileges and Immunities Clause of Article IV, Section 2, of the Constitution of the United States?

SUMMARY OF ARGUMENT

The appellants have standing to raise the constitutional issues in this appeal. They are attacking a tax which is being paid by them from their income earned in New Hampshire. The injury is determinable because the harm to each appellant is measured by his ratable share of the revenue lost by the State of Maine, his state of residence, and because the commuters tax withheld in New Hampshire is always in excess of the tax ultimately owed to New Hampshire and thus each appellant suffers the loss of use of such money until New Hampshire refunds that excess withheld. Moreover, since the appellants are the taxpayers, there is a nexus between appellants and the tax sufficient to allow standing under the concept of a "taxpayers suit."

The Commuters Income Tax violates the Equal Protection Clause of the Fourteenth Amendment. The statute discriminates against nonresidents, a politically impotent group, and the burden of justifying that discrimination should be placed on the State of New Hampshire. The tax in question establishes classifications based on residence, and arbitrarily taxes the class

of Maine residents while not taxing the class of New Hampshire residents. Furthermore, since the purpose of the tax is to divert tax revenues from Maine, there is no rational relation between that purpose which also affects Maine taxpayers who do not commute to New Hampshire and the economic impact of withholding on these appellants who do commute to New Hampshire.

The tax in question also violates the Privileges and Immunities Clause of Article IV, Section 2. The statute discriminates on the basis of residence, and is more burdensome for nonresidents than for residents. Even if all New Hampshire taxes are to be considered in determining whether there is an approximate equality of burden between resident and nonresident, the tax should still be found violative of the Clause because the tax must have been intended by the legislature to discriminate or because no otherwise justifiable purpose can explain why nonresidents from Vermont, Maine, and Massachusetts are taxed varying amounts under this tax.

ARGUMENT

I. THESE APPELLANTS HAVE STANDING TO RAISE THE ISSUE OF THE VALIDITY OF THE NEW HAMPSHIRE TAX

A. Introduction

The decision of the New Hampshire Supreme Court speaks in terms of the Privileges and Immunities Clause of Article IV, §2 of the United States Constitution and the 14th Amendment to the Constitution and concludes:

> "Because the tax is not discriminatory in its practical operation on these plaintiffs, the court holds it is not violative of the privileges and immunities clause or the equal protection clause of the Federal Constitution or of the

State Constitution." _____ N. H. _____, 316 A. 2d at 167-168.

Although the court formally held that the plaintiffs do have standing to sue, the decision in essence turns on what can be properly characterized as the question of standing and might well have been articulated in such terms. The court said:

> "Since these plaintiffs pay no greater tax by reason of the New Hampshire tax than they otherwise would pay to Maine, they are not prejudiced by the commuters income tax." _____ N. H. _____, 316 A. 2d at 167.

The court does not exclude the possibility of legal harm but declines to find that **these** plaintiffs have been harmed. Thus, the court without discussion accepts the plaintiff's standing and then proceeds to decide the substantive constitutional issues on a basis that would appear to question that very standing. For this reason, no complete analysis can proceed without treating the standing question as essentially unresolved.

Standing to raise an issue grounded on the United States Constitution is a question of federal law, even where a case comes from a state court. *Staub v. City of Baxley*, 355 U. S. 313, 318 (1958); *Doremus v. Board of Education*, 342 U. S. 429, 434 (1952); *First National Bank v. Anderson*, 269 U. S. 341, 346 (1926).

In *Flast v. Cohen*, 392 U. S. 83 (1968), this Court broadened the law of standing, going beyond the historic and rather narrow limits of such cases as *Frothingham v. Mellon*, 262 U. S. 447 (1923). *Frothingham* and its progeny had come to stand for the proposition that a federal taxpayer *qua* taxpayer is without standing to challenge the constitutionality of a federal spending statute. While the Court in *Flast* distinguished *Frothingham*, it was clear from Justice Warren's opinion that despite the facts that "a federal taxpayer's 'interest in the moneys of the treasury . . .

is comparatively minute and indeterminable' and that 'the effect upon future taxation, of any payment out of the [Treasury's] funds, . . . [is] remote, fluctuating and uncertain,' " *Flast v. Cohen*, id. at 92, quoting in part *Frothingham v. Mellon*, 262 U. S. at 487, such a taxpayer would nevertheless have standing in certain instances. We submit that, while these plaintiffs certainly do have standing under the liberalized rules of *Flast* and its progeny, the standing issue in this case can be resolved without reaching the issues raised by *Flast* by reliance on more traditional notions of standing.

B. A Taxpayer Challenging the Imposition of a Tax Has Automatic Standing

We assert that because the plaintiff-taxpayers are challenging the constitutionality of a tax which is imposed directly on them, they necessarily have standing to litigate the constitutionality of that levy.

The issue of whether a taxpayer challenging such a levy has standing solely by virtue of his being subject to the levy has seldom been explored. We would suggest that the reason why few if any cases have discussed this problem is that it is almost always **assumed** that the persons paying the improper levy automatically have standing.[1] The reason is simply that persons paying the tax are generally the persons affected economically by the tax. Here, the Maine tax credit might appear to weaken this argument of **automatic** standing, because the credit results in the same ultimate tax burden on commuters and other Maine taxpayers, ignoring for the moment the fact that the Maine commuters lose the use of at least a part of the

[1] "I do not speak of a suit by a taxpayer to enjoin the collection of a tax, which clearly would satisfy the classical plaintiff requirement, but of a suit to enjoin an expenditure." Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033, 1034 (1968).

funds withheld by New Hampshire. But the fact that the appellants' ultimate burden arguably might be unaffected were this court to invalidate the New Hampshire law in no way impairs their standing to raise the question.

This proposition is demonstrated by *Allied Stores of Ohio, Inc. v. Bowers*, 358 U. S. 522 (1959), a case dealing with the standing of a person asserting an invalid exercise of the taxing, rather than the spending, power. In *Allied Stores*, the Supreme Court of Ohio had declared that the plaintiff-taxpayer lacked standing because it would still be subject to the tax should the exemption granted to the nonresident corporation be invalidated by that court. This Court, however, unequivocally rejected the reasoning of the Supreme Court of Ohio and held that the plaintiff-taxpayer **did** have standing despite the fact that the taxpayer "[could not] show that his tax [would] be affected if the [nonresidents were compelled, by a denial of the exemption, to] pay." Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 612 (1968). Here, we have an infinitely stronger case — for, as we shall next demonstrate, the tax burdens borne by **all** Maine taxpayers, including the plaintiffs here, **are** in fact affected by the imposition of the New Hampshire Commuters Tax on those Maine citizens who work in New Hampshire. Moreover, the individual Maine commuters from whom New Hampshire withholds 4 percent of their New Hampshire income suffer a concrete and easily calculable injury resulting from their **temporary** loss of the use of at least part of their money which has been withheld by New Hampshire. See Part I. C.2. infra for a discussion of the nature of this injury.

C. The Interest of These Plaintiffs is Determinable

1. Each Maine Taxpayer suffers a determinable injury arising from New Hampshire's raid on the Treasury of Maine.

These appellants have the necessary stake in the outcome of this litigation. Even before *Flast*, under the *Frothingham* test, their interest would have been determinable. In *Frothingham*, the plaintiff's interest was indeterminable for at least two reasons, one, the dilution of the plaintiff's interest among the interests of millions of other citizens, but even more important, the difficulty of fixing an accurate dollar figure on the aggregate federal expenditure involved.

Neither problem is here present. First, the taxes paid by these appellants to New Hampshire are obviously calculable in each case. Second, the aggregate tax credits granted by the State of Maine on account of such taxes are precisely calculable. The burden to each appellant is most accurately described as that appellant's ratable share of the revenue lost to the State of Maine and made up by higher taxes to all the taxpayers of Maine. For example, in 1971, at least $400,000.00 was allowed as an aggregate credit to Maine taxpayers on account of the New Hampshire Commuter Income Tax. Obviously, this loss fell on **all** Maine taxpayers in proportion to their individual tax burdens.

Without attempting to make such minute distinctions here, it is clear that, **on average,** each of the approximately one million Maine taxpayers suffered direct pecuniary harm in the amount of at least $.40. Looking at the class of persons affected by New Hampshire tax law as being (for present purposes) all New Hampshire and Maine taxpayers, the subclass designated Maine taxpayers is arbitrarily discriminated against, each in the average amount of at least $.40. (See Part II. B.1. below, where this point is considered more fully in the context of equal protection.)

2. Each Maine commuter is also injured in fact by the loss of the use of at least part of his or her money which has been withheld by New Hampshire.

Besides the burden which each of the appellants here shares with all Maine taxpayers, the provision of the New Hampshire Commuters Income Tax which subjects each of the appellants here to withholding of four percent of his or her New Hampshire derived income imposes an injury which is in addition to the pecuniary injury which the appellants share with all their fellow taxpayers of Maine.

The tax ultimately imposed by New Hampshire on a nonresident commuter cannot exceed the tax which would be imposed by the nonresident's state of residence on an amount of income equal to that derived by the nonresident from his employment in New Hampshire. N.H.R.S.A. ch. 77-B, §2(II) (1970). Yet, at the withholding stage, New Hampshire makes no distinction between residents of states whose tax rates are higher than those of New Hampshire and those (as is Maine's) whose rates are lower. New Hampshire withholds four percent of each commuter's New Hampshire income. N.H.R.S.A. ch. 77-B, §10. Inasmuch as Maine imposes a lower rate of tax, See Appendix B, p. 30, if Maine were withholding the money from these appellants it would be withholding less from appellants than the four percent which New Hampshire presently withholds. While New Hampshire eventually returns to the commuter the amount by which the four percent withheld exceeds the maximum tax which would be imposed by the commuter's state of residence, see N.H.R.S.A. ch. 77-B, §7(III), (and is, as mentioned, imposed by New Hampshire if that tax is less than 4%, see N.H.R.S.A. ch. 77-B §2(II)), the fact remains that, because during the course of the tax year New Hampshire withholds more than Maine would have withheld, Maine commuters incur measurable and concrete pecuniary injury resulting from the loss of the use of the money that New Hampshire withholds but Maine would not have withheld. In light of the rapidly increasing cost of money in recent years, this withholding injury amounts to a

sizeable sum out of the pocket of each Maine commuter.

D. The Present Case Could Be Deemed a "Taxpayers Suit" for Purposes of Standing.

The present case on appeal could be squarely governed by the liberalized rules for standing laid down in *Flast*, even though it is not a taxpayer's suit in the sense that taxing **and** spending are involved but rather taxing alone. In "taxpayers suits," as that term of art has evolved, the interest of the plaintiffs has concerned the **spending** by Congress or a state in violation of the Constitution. The taxpayer's status *qua* taxpayer is simply the reason, the "nexus" to use the language of *Flast*, that the plaintiff has grounds to complain. We assert that the taxing and spending power of Congress (or the concomitant powers of a state) is abused at least as much where the levy itself — the tax imposed — is unconstitutional, as where revenues, once raised by valid taxation, are **used** by the government in a manner that contravenes some specific mandate of the Constitution.

All of the technical as well as policy aspects of *Flast* have been met by these appellants. There is a clear nexus between these appellants and the enactment in question, under either *Frothingham* or *Flast*. These appellants as taxpayers are the very objects of the tax enactment. Under the "first aspect" of the nexus test, "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, §8 of the Constitution." 392 U. S. at 102. It is not disputed that the New Hampshire tax in question is imposed under analagous authority in the New Hampshire Constitution. See New Hampshire Constitution, Pt. 2, Art. 5.

As the second leg of the nexus test, again these appellants are in at least as favorable a position as the plaintiffs in *Flast*. Their status as taxpayers is closely

related to the constitutional infringement in issue, the two-fold violation of the equal protection clause of the 14th Amendment and Article IV, §2 of the Constitution. While Article IV, §2 does not speak to a direct legislative prohibition, as spoken of in *Flast* [392 U. S. at 102-103.], the 14th Amendment in §1 clearly does.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws."

This prohibition applies to the states with the same directness as the First Amendment prohibition against laws respecting the establishment of religion. Compare *Flast*, 392 U. S. at 105-106.

II. THE NEW HAMPSHIRE TAX STATUTE DEPRIVES THESE PLAINTIFFS OF THE EQUAL PROTECTION OF THE LAWS.

A. A Statutory Classification Must Be Rationally Related to The Achievement of Permissible State Objectives.

New Hampshire's power to classify taxpayers is subject to the requirements of the equal protection clause of the Fourteenth Amendment. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U. S. 522, 526 (1959); *Ohio Oil Co. v. Conway*, 281 U. S. 146 (1930). While the Fourteenth Amendment does not impose an iron rule of equality of taxation, it does limit the taxing power of the States so that all persons in like circumstances shall be treated alike, "both in privileges conferred and liabilities imposed." *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293 (1898); *see Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 555 (1935).

The test which must be met by a state statute is that its classification have a "fair and substantial" relation to the object of the legislation, *Hartford Steam Boiler*

Inspection & Insurance Co. v. Harrison, 301 U. S. 459, 461 (1937); *Louisville Gas & Electric Co. v. Coleman*, 277 U. S. 32, 37 (1928); "so that all persons similarly circumstanced shall be treated alike," *F. S. Royster Guano Co. v. Virginia*, 253 U. S. 412, 415 (1920); *Air-Way Electric Appliance Corp. v. Day*, 266 U. S. 71, 85 (1924); *Schlesinger v. Wisconsin*, 270 U. S. 230, 240 (1926). Despite the broad range of a state's discretion in establishing classifications in taxing statutes, mere differences between persons included in different classes is not sufficient: the attempted classification ". . . must always rest upon some difference which bears a **reasonable and just relation to the act** in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis" (emphasis supplied). *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 155 (1897).

We submit that this Court must be particularly careful in determining whether the classifications produced by the New Hampshire statute are rationally related to the achievement of legitimate state objectives. The rationale behind the traditional rational relation test and the deference it pays to legislative classifications is that "[o]rdinarily, the legislative judgment, which ideally expresses the harmonized outlooks of the various groups in the community, is entitled to considerable respect in its evaluation of proper objectives for state action and rational means for attaining them". *Developments in the Law — Equal Protection*, 82 Harv. L. Rev. 1065, 1125 (1969). This "considerable respect" alluded to means, of course, that there is a presumption of constitutionality, *see, e.g., San Antonio School District v. Rodriguez*, 411 U. S. 1, 44 (1973), and the burden of showing that a particular classification is not rationally related to the furtherance of a permissible state objective rests upon the party challenging the statute. We contend that in this case the Court should utilize a standard of review

more searching than the rational relation test and, in so doing, should thrust upon the State of New Hampshire the burden of justifying the patent discrimination found in its statute, namely taxation of Maine residents and not equally taxing New Hampshire residents. When a state statute discriminates against a politically impotent group, as the class of nonresidents undeniably is, then, just as when Congress legislates for people by whom it was not elected, "[i]n this context, at least, the normal arguments for judicial restraint become no more than hollow shibboleths grotesquely detached from the logic which once supported them. There is no reason to pay deference to the views of a representative body which does not in fact represent those against whom it is discriminating." *United States v. Thompson*, 452 F. 2d 1333, 1341, (D.C. Cir. 1971); *see United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 (1938); *D.C. Federation of Civic Associations, Inc. v. Volpe*, 434 F.2d 436 (D.C. Cir. 1970); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). Not only is mere residency insufficient to justify the New Hampshire tax under the usual or "rational relation" test, were the burden to be shifted here, as we feel it should be, New Hampshire would be even more incapable of sustaining that burden. Indeed, the discriminatory nature of the commuter tax is so evident that New Hampshire felt compelled to enact a corresponding "tax" on its own residents so as to create an illusion of equality of treatment. See N.H.R.S.A. ch. 77-B, §2(I).[2] We would also add that the thorough scrutiny undertaken by this Court in response to constitutional challenges by nonresidents claiming violation of Article IV, §2, *see, e.g., Toomer v. Witsell*, 334 U. S. 385 (1948), while undoubtedly attributable in part to a concern that interstate commerce should remain unimpeded, nonetheless lends support to our position that the traditional deference paid to the state legislative prerogative is unwarranted when a politically impotent group is the object of the legislation.

[2] This "tax" is illusory because under no circumstance will any tax ever have to be paid to New Hampshire by the New Hampshire resident on the income he earns outside of New Hampshire. First, if the other state levies a tax then the payment of that tax to the other state constitutes full satisfaction of the New Hampshire tax obligation. On the other hand, if the other state levies no tax, then New Hampshire does not either.

B. The New Hampshire Tax Statute Creates Irrational and Arbitrary Classifications.

1. The distinction drawn between all New Hampshire taxpayers and all Maine taxpayers is an arbitrary one.

The New Hampshire tax law should be considered in light of correct classification analysis. As in any such analysis, we deal logically with a major or overall class and the purportedly defensible subclasses created. The overall class here consists of all persons potentially affected by the New Hampshire tax, i.e., all the taxpayers of Maine and New Hampshire. (The non-commuting Maine taxpayers are properly a part of this overall class, since the New Hampshire tax is based on the existence of the Maine tax credit, which credit spreads the cost of the New Hampshire tax onto all Maine taxpayers.)

Within this overall class, the New Hampshire law establishes two subclasses, Maine residents and New Hampshire residents; only the former pay taxes, based upon income earned in New Hampshire. There is no conceivable basis for this classification. The point would be easier to demonstrate if Maine and New Hampshire were the two counties of a single state. Obviously, not even the broad legislative discretion afforded the states in tax matters would let the residents of one geographical subdivision pay taxes on compensation for services performed in the other where residents of the other paid no taxes at all. Even less may one state of the Union impose a tax burden on all the

taxpayers of Maine for services performed in New Hampshire when absolutely no burden at all is imposed by New Hampshire when those same services are performed by New Hampshire residents.

2. The distinction drawn between Maine taxpayers who commute to New Hampshire and those who do not is an arbitrary one.

As already discussed, each Maine "commuter" is subject to the withholding of 4% of his or her income by the New Hampshire employer. Admittedly, the mere act of withholding might well not constitute legal harm in most tax schemes. *Travis v. Yale & Towne Manufacturing Co.*, 252 U. S. 60, 77 (1920). Congress or state legislatures determine which taxpayers are subject to withholding and which are not, and this legislative matter is certainly not normally subject to court review any more than tax rates or other details of any tax scheme. *Allied Stores of Ohio, Inc. v. Bowers, supra* at 526-527. But where the sum is withheld by New Hampshire from a particular commuter taxpayer simply as a means of giving New Hampshire access to Maine tax revenues, which access and intrusion results in the imposition of a tax burden on each and every person who pays taxes to Maine, no rational relation exists between the **purpose** of the New Hampshire tax, which is the diversion of tax revenues from Maine to New Hampshire, and the economic impact on these particular appellants, who are, by accident of geography, the agents of New Hampshire's discriminatory tax. By comparative example, a tax scheme whereby all persons with hair were subject to a tax but only those with red hair were subject to withholding, would be "palpably arbitrary," *id.* at 527, and would not pass even the minimal scrutiny test. The New Hampshire scheme is certainly no more rational in fact than such an example.[3]

[3] In addition to the two arbitrary distinctions we have discussed, it is interesting that there is a third, for the distinction drawn between different groups of nonresidents is an arbitrary one. Inasmuch as the New Hampshire tax is limited to the maximum that would be imposed by the nonresident's state of residence on an amount of income earned in that state, commuters from states, such as Maine, which have tax rates well under 4% will pay less to New Hampshire than would commuters from states whose tax rates equal or exceed 4%. (See the hypotheticals we present in the Appendix.) It is thus clear that, as between commuters from different states, New Hampshire imposes on these different nonresidents "similarly circumstanced" in every respect but that of state of residence, disparate tax burdens solely by reason of a particular commuter's domicile. Even assuming *arguendo* that New Hampshire could properly require nonresidents as a group to shoulder a portion of New Hampshire's operating expenses, forcing a particular group of nonresidents to bear a more severe burden than commuters from another state could be reasonably related to New Hampshire's permissible interests only if that greater burden could be justified by a showing that that particular group of nonresidents derives from New Hampshire more substantial services and benefits. There has been no such showing in this case. The distinction drawn between commuters from different states is a wholly arbitrary one which in no way advances the achievement of New Hampshire's legitimate objectives.

III. THE COMMUTERS TAX DEPRIVES APPELLANTS OF PRIVILEGES AND IMMUNITIES GRANTED BY NEW HAMPSHIRE TO ITS OWN CITIZENS

A. Introduction.

The purpose of the Privileges and Immunities Clause in Article IV, Section 2, of the Constitution of the United States has been expressed by this Court in various ways. In *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868), this Court said:

> "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned."

In *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1873), this Court in dictum explained the meaning of the Clause by saying:

> "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

In applying the Privileges and Immunities Clause to taxation by one state of citizens of another state, this Court has sought to determine whether the burden placed on the citizens of that other state was substantially equal to the burden which the taxing state placed on its own citizens. In *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870), the Clause was described as exempting citizens of one state from higher taxes than the state of sojourn levies against its own citizens, and, at 79 U.S. 431: "[T]hat supreme law [the Constitution] requires equality of burden, and forbids discrimination in State taxation when the power is applied to the citizens of the other States." Since most of the state taxing or licensing statutes attacked on the basis of the Privileges and Immunities Clause have been drawn in terms of "nonresidents" and "residents," this Court has recognized that if there is discrimination against all nonresidents then the discrimination necessarily must be against citizens of other states. *Toomer v. Witsell*, 334 U.S. 385 (1948); *Travis v. Yale & Towne Manufacturing Co*, 252 U.S. 60 (1920).

The first decisions by this Court concerning an income tax of one state which reached the income earned in that state by citizens of another state were *Shaffer v. Carter*, 252 U.S. 37 (1920), and *Travis, supra*. Both cases dealt with income tax statutes which taxed the incomes of both residents and nonresidents; the New

Hampshire statute here drawn into question taxes nonresidents but in practical effect does not tax residents. In *Shaffer*, this Court upheld a state income tax statute which taxed at the same rate all income earned by residents and the income earned within the state by nonresidents. In *Travis*, this Court held that the New York income tax statute which granted exemptions to residents but denied the same exemptions to nonresidents was unfairly discriminatory and violated the Privileges and Immunities Clause of Article IV, Section 2, of the United States Constitution.

Three independent arguments for the invalidity of the New Hampshire Commuters Income Tax under the Privileges and Immunities Clause are discussed in the following three subheadings.

B. Discrimination Between Resident and Nonresident; No Logical Justification.

The New Hampshire statute attacked in this appeal is discriminatory on its face. Income taxes are only imposed on nonresidents working in New Hampshire. No income tax is imposed on New Hampshire residents working in New Hampshire. The income tax supposedly imposed on New Hampshire residents working outside the state, under N.H.R.S.A. ch. 77-B, §2(I), is in practical effect no tax at all. The discrimination between resident and nonresident is clear.

The concept that the income taxes of nonresidents must not be more burdensome than those imposed on residents was the basis of the *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920) decision, where this Court found unfair discrimination in the denial by New York of exemptions to nonresidents which were given to residents. The denial of the exemptions to nonresidents made the New York income tax more onerous for nonresidents than for residents. The New Hampshire tax attacked here is certainly more onerous for nonresidents than for residents. The

tax discriminates between nonresidents and residents solely on the basis of residence. The discrimination does not appear in any way to be designed to assure equality of burden or to withdraw an unfair advantage held by nonresidents, and a tax which has differing rates for resident and nonresident, when not justifiable, is unconstitutional as a violation of the Privileges and Immunities Clause of Article IV, §2. *Smith v. Loughman*, 245 N.Y. 486, 157 N.E. 753 (Cardozo, Ch-J.), *cert. denied*, 275 U.S. 560 (1927). Courts have held violative of the Privileges and Immunities Clause state statutes which without justification taxed only the property of nonresidents, *Bivins v. Board of Comm'rs*, 66 F. 2d 351 (10th Cir. 1933), or which denied to nonresidents tax credits given to residents, *Borden v. Selden*, 259 Iowa 808, 146 N.W. 2d 306 (1966).

This Court must decide in the present appeal whether a state will be allowed to tax the incomes of nonresidents while not taxing its citizens by the same measure or at the same rate. The State of New Hampshire has no comparable substitute tax levied against its citizens which is measured by their incomes.

This situation is not at all like the backgrounds of the two property tax cases decided by this Court upholding taxes levied only against nonresidents, where complementary taxes against residents were based on the same measure, the value of the property. In *Travellers' Insurance Co. v. Connecticut*, 185 U.S. 364 (1902), decided before *Shaffer*, this Court upheld an *ad valorem* tax levied against nonresident owners of shares of stock of local corporations, while resident holders of shares of stock in the same corporations paid no tax to the state. Discrimination at the level of the entire system of property taxation was not present, however, because residents were subject to local taxation of the shares of stock at varying local rates whose average was equal to the rate paid by nonresidents

under the state tax, while nonresidents were not subject to local taxation. In *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), decided shortly after *Shaffer*, this Court, although in response to a Fourteenth Amendment and not an Article IV, §2, attack, upheld a state *ad valorem* tax on the property of nonresident corporations because the tax was in lieu of and the substantial equivalent of the average local tax burden of resident corporations owning the same type of property.

The *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920), decision does not indicate that this Court considered or the parties raised the issue of whether the difference in burdens of the New York income tax could be justified by other state taxes paid by residents and not by nonresidents. If this Court in *Travis*, involving exemptions affecting only the amount of the burden for nonresidents when residents were paying the same tax, decided to ignore other taxes paid only by residents, then in this case there should be no resort to the burdens of other taxes paid only by residents since the variation in burdens under this tax is infinite, given that residents are not subject to the tax. We consequently assert that the invalidity of the tax is clear on the face of the statute, and that the inquiry need go no further.

Assuming that the State of New Hampshire before this Court will assert as justification for the discrimination that there is, with the commuters tax, an approximate equality of burden in terms of all New Hampshire taxes borne by residents and nonresidents, and assuming that in *Travis* this Court did not consider the issue of whether equality of burden could be proven by resort to an analysis of the entire tax structure, then the inquiry must turn to new questions. The argument that there is an equality of burden when the entire tax structure of New Hampshire is considered raises first the question of who has the burden of proof.

Should New Hampshire be required to prove an equality, or should appellants be forced to prove an inequality?

Although it is not entirely clear from the record, New Hampshire evidently did not assert that there was an approximate equality of burden, and did not attempt to show any such equality in the courts below in response to the Privileges and Immunities Clause attack. New Hampshire has the detailed information on taxes paid by nonresidents, under the tax in question, as well as on revenues from other New Hampshire taxes. Since New Hampshire evidently did not raise in the courts below the equality of burden justification based on other tax burdens of its residents, appellants did not ask for information which would be the basis of a comparison of burdens, and appellants should not be given now the burden of proof where appellees have the needed information. *Cf. Mullaney v. Anderson*, 342 U.S. 415 (1952).

Any analysis of the entire New Hampshire tax structure raises conceptual problems in determining whether the burdens of the nonresident and resident are approximately equal. As mentioned above, none of the New Hampshire taxes are complementary to the tax in question. Other New Hampshire taxes are the meals and rooms tax, gasoline tax, cigarette tax, business profits tax, unearned income tax, ten dollar per capita tax on residents, industry taxes, and local real estate taxes. Contorted calculations of the respective burden of residents and nonresidents would be meaningless. The burdens of the taxes on New Hampshire residents are clearly indirect and difficult to calculate, except for the per capita tax and the unearned income tax. Moreover, although the court below asserted by implication that nonresidents pay none of the above taxes, nonresident salesmen and other workers are surely paying the gasoline and the meals and rooms taxes on products and services they purchase in New

Hampshire. We submit that this commuters income tax cannot be justified by evidence that would show an approximate equality of burden, because there is no such evidence.

This Court, however, need not answer an equality of burden justification by deciding who has the burden of proof. The statute on its face belies the validity of any argument that the statute was intended to equalize burdens or to take away an unfair advantage held by nonresidents. First, the tax on New Hampshire residents working outside New Hampshire is in practical effect no tax at all. That purported tax is meaningless. It must have been intended simply to disguise the intended discrimination against nonresidents. Second, nonresidents from different states, with the same New Hampshire derived incomes, are taxed unequally.

Any equality of burden justification which New Hampshire might put forward in support of the discrimination between residents and nonresidents would have to explain why New Hampshire has chosen to place varying burdens on nonresidents according to their place of residence and the income tax status of those states. In N.H. R.S.A. ch. 77-B, §2, the amount of the commuter's tax is the lesser of (1) four percent of New Hampshire derived income, after deducting the two thousand dollar exemption, or (2) the tax which would be imposed by the state of residence if the New Hampshire derived income had been earned by the nonresident in his state of residence. Since the rates of the income taxes in Vermont, Maine, and Massachusetts are each different and differ from New Hampshire's four percent figure, the tax placed on a nonresident from Vermont is not the same tax as that placed on a Maine resident having the same New Hampshire derived income, for example. The variations in burdens are shown in detail in Appendix B, p. 30.

Any equality of burden argument which New Hampshire might make would be illogical in view of the fact that a nonresident from Vermont does not contribute the same tax dollars to New Hampshire that a Maine resident does, or that in some cases a Massachusetts resident does. The use of New Hampshire's governmental services, or the advantages gained by the availability of services in New Hampshire, cannot vary logically by the state of residence of the nonresident.

Is there any argument which New Hampshire can advance in support of an income tax which is only applied against nonresidents, when the statute at the same time dictates differences in burdens among nonresidents merely because of their different states of residence? We have yet to hear from New Hampshire the independent reasons for the discrimination involved in taxing nonresidents but not residents which will satisfy the *Toomer v. Witsell*, 334 U.S. 385 (1948), requirement that the degree of discrimination must bear a close relation to the valid independent reasons advanced to justify the discrimination.

The *Toomer* inquiry, whether valid independent reasons exist for the disparity of treatment between residents and nonresidents and whether the degree of discrimination bears a close relation to the reasons advanced, is important for protecting the purpose of the Privileges and Immunities Clause, to protect citizens from one state from unfair discrimination at the hands of another state. Citizens of a state have political power in that state, and the existence of that power operates as a natural check upon the conduct of elected representatives in drafting tax legislation for the state which affects its citizens. Citizens of another state, however, have no political power in the state of sojourn. The elected representatives of the state of sojourn do not represent the nonresidents' interests. The absence of that political power creates the need for close judicial scrutiny of the purported reasons for the discrimination and their relation to the degree of discrimination, when a nonresident attacks as a violation of the Privileges and Immunities Clause of Article IV, §2, a statute aimed only at nonresidents.

We submit that the *Toomer* inquiry should be the standard to be applied in judging the validity of the New Hampshire Commuters Income Tax. We further submit that there is no independent reason for an income tax only imposed on nonresidents, which also explains reasonably the need for different treatment of nonresidents from different states.

C. Discrimination Among Nonresidents.

The reason for close judicial scrutiny when judging a statute's discrimination between resident and nonresident applies with equal force when the discrimination is among nonresidents. The statute here in question discriminates among nonresidents of different states by taxing them in amounts or at rates which vary according to the nonresident's state of residence. We cannot imagine any proper purpose of the State of New Hampshire which would justify the imposition of unequal taxes on nonresidents with the same income but with different states of residence. The variations in the burdens of nonresidents illustrated in Appendix B, p. 30, cannot be supported.

If the variation in the New Hampshire Commuters Income Tax burdens borne by individuals from Vermont, Maine, and Massachusetts is unjustifiable under the *Toomer v. Witsell*, 334 U.S. 385 (1948), inquiry, then the Commuters Income Tax should be declared in violation of the Privileges and Immunities Clause. We concede that no decision by this Court can be relied on to support the contention that unequal treatment among nonresidents from different states constitutes a violation of the Clause. The contention is a novel one. If the purpose of the Clause is to prevent unfair discrimination by the taxing state against nonresidents,

however, the issue of the taxing state's discriminating among nonresidents without apparent justification would seem to be within the ambit of the Clause.

D. Nonresidents As The "Peculiar Source".

A state's objective of forcing nonresident commuters to bear a share of the burden of New Hampshire public expenses is, of course, a reasonable one. The reasonableness of this objective, however, does not confer on New Hampshire the unbridled right to employ any means whatsoever to achieve that objective. As explained in *Toomer v. Witsell*, 334 U.S. 385, 398 (1948):

> "[The] argument assumes that any means adopted to obtain valid objectives necessarily [square] with the privileges and immunities clause. It overlooks the purpose of that clause ... to outlaw classifications based on the fact of non-citizenship **unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed** ...." (emphasis supplied.)

A general income tax, as is the New Hampshire commuter tax, is designed to produce general revenues which may be then expended by the state for myriad legitimate public purposes and services which will benefit both residents and nonresident commuters alike. There is no doubt that the state can impose an income tax subjecting to New Hampshire taxation the income of nonresidents which is derived from their employment in that state. *Shaffer v. Carter*, 252 U.S. 37 (1920); *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920). The nonresidents can thus be compelled, by means of an income tax, to share a **portion** of the burden of the state's general operating expenses. Perhaps nonresidents further could be forced to bear the entire burden of certain specific expenses incurred by New Hampshire if the nonresidents, as a

group, constitute the "peculiar source" of that specific expense the state incurs. However, where a state tax statute is discriminatory on its face because it draws a classification based on state citizenship, and imposes a higher tax rate on nonresidents than it does on residents, the state, to establish the constitutionality of such a statute, must show "something to indicate that non-citizens constitute a peculiar source" of the state expense which the tax is designed to alleviate. In other words, New Hampshire would have the burden of showing here that nonresidents as a group are a **peculiar source** of, or directly responsible for a specific percentage of the general operating expenses which the state incurs, and which an income tax is intended to cover. This New Hampshire has not done. The New Hampshire Commuter Income Tax therefore discriminates against nonresidents and, in so doing, violates Article IV, §2 of the United States Constitution.

E. The Opinion of the New Hampshire Supreme Court.

We submit that the analysis of the Clause by the court below was in error. By stressing the credit given by Maine for taxes the Maine commuters pay under the commuters tax, the court below misapplied the concept in *Shaffer v. Carter*, 252 U.S. 37, 55 (1920), that niceties of definition or of theory are less important than "... the practical operation and effect of the tax imposed." The court below treated the *Shaffer* concept as a justification for ignoring the unequal treatment of resident and nonresident by the New Hampshire statute. The court below decided that because of the Maine credit there was no prejudice to the Maine resident in the sense of a competitive disadvantage and because the Maine resident was not subject to an increased overall income tax liability by virtue of his New Hampshire employment.

We focus instead on whether residents and nonresidents are treated equally by the New Hampshire stat-

ute itself. The *Shaffer* concept of evaluating the validity of a statute by its practical operation and effect does not mean that statutes of other states can be used to rescue an otherwise unconstitutional statute. That Maine gives to its residents on their Maine income tax returns a credit for the New Hampshire Commuters Income Tax paid by them does not justify New Hampshire's discriminating against Maine commuters, without justification.

In *Shaffer*, this Court's examination of the practical operation and effect of the tax was restricted to the single tax law in question and did not include those of the nonresident's state of residence. Can the constitutional validity or invalidity of tax statutes in state A be so easily decided by reference to statutes in state B, or must the statutes of state A be judged on their own merits? Bear in mind that although the amount of the New Hampshire tax on Maine residents is based on the Maine tax statutes, the exaction of the New Hampshire tax is not conditioned on the existence of a credit given by Maine to its residents. The New Hampshire tax is imposed on a nonresident regardless of whether or not the nonresident's state of residence grants a tax credit for the New Hampshire tax. Can it be said that if state B, i.e. Maine, changes its statutes, for instance by dropping the credit, then the statutes in state A may be constitutionally invalid whereas they were not invalid before the change? We emphatically suggest that the credit given by Maine ought not to be considered in addressing the validity under the Privileges and Immunities Clause of the statute in question. Although it may be argued because of the credit that the individual plaintiffs bore no heavier personal tax burden than they would have had without the commuters tax, that circumstance could affect, if anything, only the question of standing (and we certainly contend that it has no such effect) and not the substantive issue concerning the Clause.

The mere assertion in the opinion, moreover, that this tax operates to produce equality ought not to be sufficient to justify the tax as equalizing the burden between resident and nonresident. The assertion that nonresidents pay nothing for state services is not supported by anything found in the record. As was pointed out earlier, commuters doubtless contribute at least by means of the meals and rooms tax and the gasoline tax. The court below accepted the Commuter Income Tax as redressing an imbalance whose existence and degree were not really known. Furthermore, the court below ignored the varying treatment accorded nonresidents from different states.

CONCLUSION

Maine and Vermont submit that appellants have standing to raise the important constitutional issues in this case. Maine and Vermont submit that the Commuters Income Tax unfairly and arbitrarily discriminates against nonresidents, and should be found to contravene the guarantees of the United States Constitution found in the Privileges and Immunities Clause in Article IV, Section 2, and in the Equal Protection Clause in the Fourteenth Amendment. Accordingly, the Court should hold the Commuters Income Tax an invalid exercise of New Hampshire's taxing power, and reverse the decision of the court below.

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APPENDIX A

NEW HAMPSHIRE STATUTES

N.H.R.S.A. ch. 77-B

Selected Sections

77-B:1 Definitions. As used in this chapter the following terms shall have the following meanings unless the context clearly requires otherwise: . . . . .

X. "New Hampshire derived income" shall mean, for any taxable year:

(a) rents, royalties and gain derived from the ownership of property within the state;

(b) wages, salaries, fees, commissions or other income received with respect to personal services performed of whatever kind and in whatever form paid derived from activities (1) performed within this state, or (2) performed from a base of operations within this state and not subject to an income tax within the state where the services are performed.

(c) income derived from every business, trade, occupation or profession of the taxpayer to the extent that the business, trade, occupation or profession is carried on within the state. But New Hampshire derived income shall not include any income excluded from adjusted gross income as defined in this section nor any taxable business profits taxed pursuant to the business profits tax.

77-B:2 Tax Imposed.

I. On Residents, Income Earned Outside New Hampshire. A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 "New Hampshire taxable income;" provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph.

II. On Nonresidents, Income Earned in New Hampshire. A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.

III. Exception. Notwithstanding the provisions of paragraphs I and II, no tax shall be imposed upon salaries paid to men or women in the armed forces of the United States.

77-B:7 Returns and Refunds of Individuals.

. . . . . .

III. Whenever a taxpayer shall file a return which shows that his withholding tax or estimated tax ex-

ceeds the amount of tax liability due under this chapter, he shall be due a refund and the tax commission shall forthwith certify the amount of said refund to the state treasurer who shall pay the same to the taxpayer; provided, however, that at the option of the taxpayer, said refund may be credited against any tax due from said taxpayer for the succeeding calendar year.

77-B:10 Who Must Withhold. Every employer, as defined under the laws of the United States in effect April 26, 1947, with respect to income tax collected at its source, employing any person liable for a tax pursuant to the provisions of this chapter shall deduct and withhold upon wages paid to said employee, a tax equal to four percent of such wages subject to the provisions of RSA 77-B:13.

APPENDIX B

EXAMPLES OF THE VARIATIONS IN THE COMMUTERS TAX BURDEN ON NONRESIDENTS, BY STATE OF RESIDENCE OF THE NONRESIDENT.

HYPOTHETICAL I:

A SINGLE INDIVIDUAL WITH NO DEPENDENTS EARNED $8,000.00 IN WAGES IN NEW HAMPSHIRE IN 1970. HAD NO OTHER INCOME, AND DID NOT ITEMIZE DEDUCTIONS.

A. **His state of residence is Maine.**

(1) His Maine taxes if the income had been earned in Maine, with computations and statutes cited:

Income:	$8,000.00	INT. REV. CODE of 1954, §§61, 62 ME. REV. STAT. ANN. t. 36, §5121 (1969)

Standard Deduction:	$800.00	§5124
Exemptions:	$1,000.00	§5126
Income Subject to Tax:	$6,200.00	
Tax:	$116.00	§5111

(2) His New Hampshire tax is computed as follows, ignoring the Maine tax:

N.H. Derived Income:	$8,000.00	N.H.R.S.A. ch. 77-B, §1(X) (1970)
Exemption:	$2,000.00	§2(II)
Taxable Income:	$6,000.00	
Tax:	$240.00	§2(II)

(3) Conclusion: Since his Maine tax on the same income would be only $116.00, the New Hampshire tax is $116.00, and by virtue of ME. REV. STAT. ANN. t. 36, §5127, no tax is paid to Maine.

B. **His state of residence is Massachusetts.**

(1) His Massachusetts tax, if the income had been earned in Massachusetts, with computations and statutes cited:

Income:	$8,000.00	MASS. GEN. LAWS ch. 62, §6 (1969)
Exemptions:	$2,000.00	§5B [now §3(B) (b)]
Net Taxable Income:	$6,000.00	
Tax:	$240.00	§5(b)

(2) New Hampshire tax computation, ignoring Massachusetts tax:
Same as A(2), above: Tax = $240.00

(3) Conclusion: The New Hampshire tax is $240.00, and by virtue of the credit under MASS. GEN. LAWS ch. 62, §6, the resident pays $240.00 — $240.00, or $00.00 to Massachusetts.

C. **His state of residence is Vermont.**

(1) His Vermont tax, if the income had been earned in Vermont, with computations and statutes cited:

Federal adjusted gross income:	$8,000.00	INT. REV. CODE of 1954, §§61, 62
Standard deduction:	$800.00	§141
Personal exemption:	$625.00	Act of Dec. 30, 1969, P.L. No. 91-172, §801, 83 Stat. 487, 675
Taxable income:	$6,575.00	§63
Federal tax:	$1,273.75	Act of Feb. 26, 1964, P.L. No. 88-272, §111(a), 78 Stat. 19
Surtax:	$32.00	Act of Dec. 30, 1969, P.L. No. 91-172, §701(a) (1), 83, Stat. 487
Federal income tax liability:	$1,305.75	
Vermont tax: 28.75%	$375.40	25% of federal tax liability from: VT. STAT. ANN. t. 32, §5822 (1970) 15% surtax from §5830

(2) New Hampshire tax computation, ignoring Vermont tax:

Same as A(2) above: Tax = $240.00

(3) Conclusion: The New Hampshire tax is $240.00, and by virtue of the credit under VT. STAT. ANN. t. 32, §5825, the resident pays $375.00 — $240.00, or $135.40 to Vermont.

D. **His state of residence is New Hampshire — No Tax.**

CONCLUSION OF HYPOTHETICAL I:

The Maine resident pays New Hampshire $116.00, the Massachusetts resident pays New Hampshire $240.00, the Vermont resident pays New Hampshire $240.00, and the New Hampshire resident pays New Hampshire nothing in income tax, *even though their incomes were identical.*

HYPOTHETICAL II:

A MARRIED INDIVIDUAL WITH TWO CHILDREN, THUS WITH THREE DEPENDENTS AND FILING A JOINT RETURN, EARNED $8,000.00 IN WAGES IN NEW HAMPSHIRE IN 1970, HAD NO OTHER INCOME, AND DID NOT ITEMIZE DEDUCTIONS.

Statutes are the same as those cited for the examples above, with additional sections noted where necessary.

W. **His state of residence is Maine.**

(1) Maine tax computation similar to A(1) above:

Standard deduction:	$800.00	
Exemptions: 4 x $1000.00 =	$4,000.00	
Income Subject to Tax:	$3,200.00	(one half is $1,600.00)
Tax:	$32.00	§5113

(2) New Hampshire tax computation identical to A(2) above:

Tax: $240.00

(3) Conclusion: The Maine resident pays $32.00 to New Hampshire, nothing to Maine.

X. His residence is Massachusetts.

(1) Massachusetts tax computation similar to B(1) above:

Exemptions: $3,800.00 ($2,600.00 + $600.00 + $600.00)

Net Taxable Income: $4,200.00

Tax: $168.00

(2) New Hampshire tax computation identical to A(2) above:

Tax: $240.00

(3) Conclusion: The Massachusetts resident pays $168.00 to New Hampshire, nothing to Massachusetts.

Y. His state of residence is Vermont.

(1) Vermont tax computation similar to C(1) above:

Federal Tax Basis:

Personal exemptions: $2,500.00 (4 x $625.00)

Taxable income: $4,700.00

Federal tax: $753.00

Surtax: $19.00

Federal income tax liability: $772.00

Vermont tax (28.75%): $221.95

(2) New Hampshire tax computation identical to A(2) above:

Tax = $240.00

(3) Conclusion: The Vermont resident pays $221.95 to New Hampshire, nothing to Vermont.

Z. His state of residence is New Hampshire — No Tax.

CONCLUSION OF HYPOTHETICAL II:

The Maine resident pays New Hampshire $32.00, the Massachusetts resident pays New Hampshire $168.00, the Vermont resident pays New Hampshire $221.95, and the New Hampshire resident pays New Hampshire nothing in income tax, *even though their incomes were identical.*